Issue date: 02Apr2002**U.S. Department of Labor** Board of Alien Labor Certification Appeals

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Case No. 2001-INA-00049
ETA Case No. P1999-TX-0631

In the Matter of:

NASIR ENTERPRISES, INC.,
Employer,

on behalf of

LATIF SOHAIL,
Alien.

Before: Vittone, Burke, and Neal
Administrative Law Judges

Mollie W. Neal
Administrative Law Judge

DECISION AND ORDER

This matter arises from an application for labor certification on behalf of Latif Sohail ("Alien") filed by Nasir Entreprises, Inc. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A), as amended ("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under Section 212(a)(5)(A) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the

alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R., Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

On January 8, 1998, Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Convenience Store Manager. (AF 60). Employer supplemented its application on November 13, 1998, October 28, 1999, and March 10, 2000. (AF 60, 49, and 42). The minimum requirements for the position were listed as high school education, two years experience in the job offered, or two years experience in other retail position, and a willingness to work 2:00 p.m.-midnight when required. (AF 61).

The notice to the Employer from the Texas job service office ("TWC") indicated the Employer must advertise the job opportunity for three consecutive days in a newspaper of general circulation in the area of intended employment and that the ad must end with the phrases, "Apply at the Texas Workforce Commission, Galveston, Texas, or send resume...." In response to the Employer's recruitment activity, the TWC referred the names and addresses of eleven applicants to the Employer with instructions that recruitment efforts be documented. It was suggested that Employer contact each applicant via "certified, return receipt requested" mail, as a means of providing proof of its good faith recruitment effort. (AF 30, 31, 32, 34, 37, 41).

Employer rejected all eleven applicants as either unqualified or unavailable for the position. In its initial recruitment report, the Employer indicated that six of the referrals (Clark, Brown, Dixon, Lawe, Lewis, and Molnar) were not considered because they did not contact it directly to express an interest in employment. Three other applicants, who submitted resumes to TWC, were rejected after unsuccessful attempts to contact them by phone. Employer reported that another applicant (Ruckman) was not hired because he lacked the requisite experience in retail, and another (Torres) was rejected because he was unwilling to work the night shift, when required. (AF 29)

A Notice of Findings ("NOF") was issued by the CO on July 31, 2000, proposing to deny

labor certification on several bases. The CO challenged Employer's good faith recruitment efforts relating to ten of the applicants, noting the lack of evidence in the record documenting that the applicants were contacted. The CO further found the record insufficient to support the Employer's claim that Fernando Torres was unwilling to work night shift when required. (AF 21-23).

The NOF directed the Employer to contact and to provide recruitment results for all ten applicants. Employer was advised that its statement of recruitment activity must be supported by documentation, and that for each applicant not hired, the lawful job related reasons for rejection must be specified.

In response, the Employer sent certified letters notifying three applicants (Dickard, Ferro, and Ludwig) of continued availability of the job opportunity and requesting that each applicant contact the employer by phone to arrange an interview, if interested in the position. None responded. (AF 16-19).

Employer responded to the NOF that six individuals referred by TWC had not contacted it by telephone, resume, or in any other way, expressing an interest in the job opening. Employer conceded it declined to contact these six individuals, indicating that it could find no legal authority, either regulation or case law, to support the CO's position that these "potential" job applicants must be contacted by the employer. Employer maintained that these "prospective" job applicants were not "willing" to take or "available" for the position, as they failed to follow up their initial inquiry with TWC by applying directly to the employer.

Finally, Employer challenged the CO's requirement for further documentation that applicant Torres declined the offer because he was unwilling to work the night shift, maintaining that its written report of recruitment results is sufficient.

A Final Determination denying labor certification was issued by the CO on November 20, 2000, based upon a finding that Employer failed to contact six of the eleven referrals and refused to provide proof that one of the referrals refused the job opportunity because he did not want to work the night shift. (AF 3-4).

Employer requested administrative review by letter dated December 21, 2000. (AF 1-9).

DISCUSSION

Section 656.21(b)(6) provides that, if U.S. workers apply for the job opportunity, the employer must document that they were rejected solely for lawful job-related reasons. Employer has an obligation to investigate the qualifications of apparently qualified job candidates, *Gorchev & Gorchev Graphic Design*, 1989 INA 118 (Nov. 29, 1990) (en banc), and must attempt to contact potentially qualified applicants as soon as possible after receiving job applicant referrals from the state

job service. *See Loma Linda Foods, Inc*., 1989 INA 289 (Nov. 26, 1991)(en banc). An employer's rejection of a US worker who satisfies the minimum requirements specified on the labor application is unlawful. *American Cafe*, 1990 INA 026 (Jan. 24, 1991). Here, Employer attempts to escape its affirmative duty under the regulatory requirements, arguing that the six job service referrals were merely "potential" applicants, who were required to contact it directly, either by phone or by submitting an application. However, by failing to explain or document the lack of qualifications of these six job applicant referrals, Employer has failed to specify lawful job related reasons for rejecting these U.S. job applicants.

Moreover, implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc*., 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. Employer has not met its burden of proving good-faith recruitment efforts. *See Yaron Development Co., Inc*., 1998 INA 178 (Apr. 19, 1991)(en banc). See *Allcity Auto Repairs*, 1991 INA 008 (Mar. 24, 1993); *Delmonico Hotel Co.*, 1992 INA 324 (Jul. 20, 1993) (where an employer's efforts to reach an applicant by telephone are unsuccessful, a reasonable effort requires an alternative method of contact, such as mail). Employer did not attempt to contact the job applicant referrals by phone; and despite the CO's recommendation that attempts to contact the applicants be made by "certified, return receipt" mail, it refused to mail letters to these job candidates. Under the circumstances, the employer has failed to document good faith recruitment efforts, and to prove that there are not sufficient U. S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

The CO acted within the permissible scope of his authority, in his determination of whether U.S. workers were available for the job, by requiring Employer to consider all the TWC referrals. 20 C.F.R. §656.24(b)(2)(iii). Thus, the CO's instructions to the Employer to contact these applicants for the job was within the reasonable and appropriate scope of his consideration of whether certification should be granted. His determination to deny certification was likewise appropriate, where the employer refused to obtain and provide the documentation that he reasonably requested. *See Dr. and Mrs. Bernard Greenbaum*, 1995 INA 142 (Mar. 27, 1997); Dr. *Daryao S. Khatri*, 1994 INA 016 (Mar. 31, 1995). The Employer has not asserted an inability to contact these applicants, and we note that the address of each applicant referral was provided.

In conclusion, we find that Employer's reliance on the position that such applicant referrals were required to contact it directly to express an interest in the job is misplaced. The Employer has the burden to establish lawful rejection, including good faith efforts to timely contact U.S. applicants, where appropriate. 20 C. F. R. §656.21(b)(7); *Creative Cabinets*, 1989-INA-181 (Dec. 24, 1990), (en banc). Here, where Employer failed entirely to comply with a relevant, rational, authorized CO request to contact these six applicant referrals, it has failed to meet its burden.

Finally, we find that the Notice of Findings in this matter was adequate to provide the Employer

an opportunity to rebut or cure the alleged defects. *Downey Orthopedic Medical Group,* 1987-INA-674 (Mar. 16, 1988) (en banc). The CO was not required to provide Employer with citations to legal authority for his findings. To provide adequate notice, the CO need only identify the section or subsection allegedly violated and the nature of the violation, *Flemah, Inc.*, 1988-INA-62 (Feb. 21, 1989) (en banc); inform the employer of the evidence supporting the challenge, *Shaw's Crab House,* 1987-INA-714 (Sept. 30, 1988) (en banc); and provide instructions for rebutting and curing the violation, *Peter Hsieh*, 1988-INA-540 (Nov. 30, 1989). *See also Carlos Uy III*, 1997 INA 304 (1999) (en banc). The NOF in this matter satisfied the minimum requirements for adequacy and sufficiency.

Accordingly, certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

A
Mollie W. Neal
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written

statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.